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Supreme Court, U.S.
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No. 92-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION
as Receiver for New Bank of New England, N.A.,

Petitioner,

v.

CORMAN CONSTRUCTION, INC., SIGAL CONSTRUCTION CORPORATION and DEWBERRY & DAVIS/THE JOSEPH BOGGS STUDIO,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

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PETITION FOR A WRIT OF CERTIORARI

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May 7, 1993

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QUESTIONS PRESENTED

1. Whether the attachment, without prior notice and hearing, of a mechanic's lien against interests in real property held by both owners of the real property and other holders of interests therein not in privity with the lien claimant, is a taking of property invoking the due process requirements of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the right to a post-deprivation hearing to determine the invalidity of a mechanic's lien without any requirement of a hearing within a reasonable time and placing the burden on the owner of an interest in real property not in privity with the lien claimant to prove the invalidity of the lien, rather than upon the lien claimant to establish the lien, provides a meaningful and effective post-deprivation remedy as required by the Fourteenth Amendment to the Constitution.

3. Whether a statutory scheme which does not provide any early remedy to the holder of an interest in real property subjected to a mechanic's lien without prior notice and hearing, and which provides judicial immunity to the party filing such lien, provides a meaningful remedy for the wrongful, albeit temporary, taking, as required by the Fourteenth Amendment to the Constitution of the United States.

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PETITION FOR A WRIT OF CERTIORARI

SPECIAL NOTIFICATION TO THE ATTORNEY GENERAL OF VIRGINIA PURSUANT TO RULE 29.4(c)

Please take notice that the constitutionality of the Virginia mechanic's lien statute is drawn in question in this proceeding and 28 U.S.C. Section 2403(b) may be applicable.

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[1] There is no parent or subsidiary company to be listed pursuant to Supreme Court Rule 29.1.

OPINIONS BELOW

The Order of the Supreme Court of Virginia is not reported, and is reprinted in the Appendix to this Petition at Page 1a. The Decree of the Circuit Court of Arlington County, Virginia is not reported, and is reprinted in the Appendix at Pages 2a-3a.

JURISDICTION

The decision of the Supreme Court of Virginia was issued on February 22, 1993. See Appendix at 1a. In this case, the validity of the Virginia mechanic's lien statute was drawn in question on the ground of its being repugnant to the Constitution of the United States. This Court therefore has jurisdiction under 28 U.S.C. Section 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 43-3(a) of the 1950 Code of Virginia provides in pertinent part as follows:

> All persons performing labor or furnishing materials of the value of fifty dollars or more, for the construction, removal, repair or improvement of any building or structure permanently annexed to the freehold. . . shall have a lien, if perfected as hereinafter provided, upon such building or structure, and so much land therewith as shall be necessary for the convenient use and enjoyment thereof. . . .

Section 43-4 of the 1950 Code of Virginia provides as follows:

> A general contractor, or any other lien claimant under Section 43-7 and 43-9, in order to perfect the lien given by Section 43-3, shall file at any time after the work is commenced or material furnished, but not later than ninety days from the last day of the month in which he last performs labor or furnishes material, but in no event later than ninety days from the time such building, structure, or railroad is completed, or the work thereon otherwise terminated in the clerk's office in the county or city in which the building, structure or railroad, or any part thereof is . . . a memorandum showing the names of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, and the time or times when the same is or will be due and payable, verified by the oath of the claimant, or his agent, including a statement declaring his intention to claim the benefit of the lien, and giving a brief description of the property on which he claims a lien. It shall be the duty of the clerk in whose office such memorandum shall be filed as hereinabove provided to record and index the same as provided in Section 43-4.1, in the name as well of the claimant of the lien as of the owner of the property, and from the time of such recording and indexing all persons shall be deemed to have notice thereof.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this case, Petitioner moved the Circuit Court of Arlington County, Virginia (the "Trial Court") to determine the mechanic's liens filed by Respondents against real property in which Petitioner owned an interest to be invalid on the ground that the Virginia mechanic's lien statute effected a taking of a significant property interest without due process of law in contravention of the Fourteenth Amendment to the United States Constitution. See Appendix at 6a.

Petitioner contended that the filing of a lien, while not working a dispossession of property, impairs the ability to alienate property at full value and therefore constitutes a taking of a constitutionally cognizable interest in property, in which case an owner of an interest in real property is entitled to procedural due process. The challenge to the statute was fostered by the decision of the United States Supreme Court in *Connecticut v. Doehr*, 501 U.S. ___, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), which held that even the temporary or partial impairments to property rights that attachments and liens entail are sufficient to merit due process protection. Petitioner further contended that the lien statute is unconstitutional because it does not provide for prior notice, hearing or adequate safeguards, such as judicial supervision of the perfection

process, a probable cause hearing immediately subsequent to the filing of the lien or the posting of a bond by the lienor at the time of filing, against the deprivation of property as required by *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) and *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

The Trial Court held that the Virginia mechanic's lien statute did not effect a constitutionally cognizable deprivation of property. The Trial Court nevertheless went on to hold that, even if the property interest affected was cognizable, the statute provided adequate procedural safeguards against erroneous deprivation and therefore upheld the validity of the lien statute. See Appendix at 4a.

The Supreme Court of Virginia entered its Order on February 22, 1993, holding that there was no reversible error in the Trial Court's Decree and dismissing Petitioner's petition for appeal. 1a. Petitioner seeks review by this Court because Virginia's lien statute violates the due process clause of the Fourteenth Amendment to the United States Constitution for the reasons contended at the Trial Court and State Supreme Court levels. On March 30, 1993, the Supreme Court of Virginia entered an Order deferring issuance of its Mandate in this case pending Petitioner's presentation of this Petition for a Writ of Certiorari to this Court. See Appendix at 5a.

SUMMARY OF REASONS FOR GRANTING A WRIT

Since *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), the United States Supreme Court has decided a number of cases challenging the constitutionality of creditor's prejudg-

ment remedies. The Court has not refined and systematized the due process concepts first articulated in *Sniadach*, and the latest post-*Sniadach* decision, *Connecticut v. Doehr*, leaves lower courts in conflict as to what process is due in cases where, as here, the lienor claims a pre-existing interest in the property sought to be attached. This case offers this Court the opportunity to decide and refine this important issue of constitutional law.

All states have statutes that, like the Virginia statute at issue here, grant mechanic's and materialmen liens on real property which is improved by their labor and materials. When such a lien is filed without prior notice and without opportunity for a hearing and the state statute does not provide for a hearing immediately subsequent to the filing of the lien and for the posting of a bond or other compensation to the owner of an interest in real property for damages caused by the erroneous filing of the lien, the state statute effects a deprivation of a significant property interest without due process of law. This Court should grant certiorari to review the important constitutional issues presented by the Virginia Supreme Court's decision in this case.

The decision below raises important constitutional questions under this Court's decisions concerning the Due Process Clause of the Fourteenth Amendment. The Virginia Supreme Court's decision upholding the constitutionality of a statute that effects a judicially privileged taking of a constitutionally cognizable interest in property without prior notice and an opportunity to be heard and without providing for adequate procedural safeguards is inconsistent with the decisions of this Court holding such statutes to

be unconstitutional. Review by this Court is warranted because *Mitchell, North Georgia*, and *Doehr* require a probable cause hearing immediately subsequent to the filing of the lien or attachment and require the posting of a bond by the lienor at the time of filing, and the mechanic's lien statutes of most states, including Virginia's, do not provide those protections against the erroneous deprivation of property.

REASONS FOR GRANTING THE WRIT

VIRGINIA'S HOLDING THAT THE COMBINATION OF PROCEDURAL SAFEGUARDS CONTAINED IN ITS MECHANIC'S LIEN STATUTE SATISFIES THE REQUIREMENTS OF PROCEDURAL DUE PROCESS PRESENTS AN IMPORTANT ISSUE UNDER THE FOURTEENTH AMENDMENT THAT SHOULD BE RESOLVED BY THIS COURT.

A. State mechanic's lien statutes effect a deprivation of a significant property interest

All 50 states, as well as the District of Columbia, have mechanic's lien statutes.[2] These laws give persons who furnish labor or material for the improvement of real property the right to claim an interest in the property. The right to file a lien arises from the performance of work on the property; however, to preserve, perfect and enforce the lien, the mechanic must comply with certain statutory requirements.

Mechanic's lien statutes generally permit the lienor to record a lien with the recorder of deeds or a similar

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[2] A survey of state mechanic's lien statutes setting forth their various procedural safeguards is included in the Appendix beginning at page 10a.

official. *See, e.g.*, Va. Code Section 43-4. In Virginia, the lienor must submit a memorandum identifying the property against which the lien is claimed, the owner of the property, the amount claimed and the time when the same was due and payable. *Id.* The statutes generally provide that the lien is discharged unless the lien is filed within a specified period of time—in Virginia, no more than 90 days after work on the improvement is completed. Va. Code Section 43-4. Once the lien is recorded, it is constructive notice to subsequent owners of an interest in the real property that their interest in the property is subordinate to the lienor's. From the time that the lien is recorded until it is ultimately discharged or enforced, the value of the property is reduced at least[3] by the amount of the lien because prudent persons subsequently acquiring an interest in the real property will protect themselves by deducting the amount of the lien from the value of the property. The lienor, having filed the lien by recording it, may be under no obligation to take further action—in Virginia, he is not. If he wishes to foreclose the lien and have the property sold to satisfy his claim, he must institute judicial proceedings. If no foreclosure action is brought, the lien continues as an encumbrance on the property until it is discharged by payment or until its statutory life expires. The statutory life varies from state to state, and in Virginia, is the later of six months from recording of the lien, or sixty days from when work

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[3] Some statutes secure attorney's fees, interest and costs. In *American Standard Homes Corporation v. Reinecke*, ___ Va. ___ , 425 S.E.2d 515, 520 (1993), the Supreme Court of Virginia held that mechanic's lien claimants are entitled to prejudgment interest on the amount of their liens.

on the improvement is terminated. Va. Code Section 43-17.

The impact of the lien on the owner of the interest in real property can vary from state to state because some states permit the enforceable aggregate amount of liens filed to exceed the amount due under the contract for the improvement, while other states limit the liens to the unpaid contract price. *See* 53 Am. Jur. 2d, *Mechanic's Liens*, Section 8 (1970). Thus, under the first scheme, the extent of the owner's liability can be in excess of the anticipated cost to him. The Virginia statute limits the owner's total liability to the contract price. Va. Code Sections 43-7, -9. However, the statute allows subcontractors and materialmen to file liens even though the general contractor has filed a lien for the same work or materials. Va. Code Sections 43-7, -9. Thus, an owner could conceivably have liens filed against his property amounting to multiples of the amount actually owed.

The procedural protections afforded the owner of an interest in real property also vary among the states. Most states do not require either the posting of a bond by the lienor or provide for judicial supervision of the perfection of the lien. Many states provide no means for the owner of the interest in real property either to dissolve the filed lien or to hasten litigation on the validity of the lien. Other states permit an owner to compel a lienor to bring enforcement proceedings, however, a lien in these states encumbers the property until final determination of the validity of the claim, a process that can involve extensive delay. Virginia provides slightly more protection for the owner of the interest in real property than these latter states. Virginia permits any interested party,

upon a showing of good cause, and after reasonable notice to the lien claimant, to petition the court to hold a hearing to determine the validity of a perfected mechanic's lien. Va. Code Section 43-17.1. The show cause requirement, however, offers little by way of immediate relief to the owner of the interest in real property: the burden of going forward and, apparently, the burden of proof are on the owner of the interest in the real property. The owner of the interest in the real property—with the permission of the court—may also release his property from the lien by posting a bond for double the amount claimed. Va. Code Section 43-71.

Virginia's statute, as well as those of most other states, permits the lienor to lien property without judicial supervision or the posting of a bond. Once filed, the lien reduces the value of the owner's real property without giving the owner of the interest in the real property the right to an immediate hearing at which invalid or excessive claims can be cancelled or reduced. The amount due to the lienor may prove less than the amount liened when the lien is eventually enforced, but a wholly unjustified lien reduces the property value in the interim just as much as does a wholly justified lien. Unless permitted and able to post a bond, the owner of the interest in the real property cannot ameliorate the property deprivation occasioned by the lien. The owner of the interest in the real property must abide a judicial determination most assuredly far removed in time from the filing of the lien. This delay, coupled with the impairment in the property value resulting from the mere filing of the lien, raises the procedural due process issue for which review is sought by this Court.

B. The Fourteenth Amendment requires an immediate post-deprivation hearing, judicial supervision and the posting of a bond by the attaching creditor.

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) held that, absent exigent circumstances, due process required prior notice and a hearing prior to the deprivation of any significant property interest. *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) seems to have retreated from the rigid prior hearing rule announced by this Court in *Fuentes*. *Mitchell* upheld a Louisiana sequestration statute that did not provide a hearing prior to the seizure of the debtor's personalty. The statute did provide for an immediate post-deprivation hearing and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued. The statute also required judicial supervision of the issuance of the writ of sequestration and obliged the creditor to post a bond prior to issuance of the writ.

Mitchell examined the Louisiana procedure's impact on competing owners of different interests in personalty—the buyer's right to possession *versus* the seller's lien—and the extent to which the procedure protected against erroneous deprivations. *Mitchell* assessed whether the procedure achieved "a constitutional accommodation of the respective interests of buyer and seller." 416 U.S. at 610. *Mitchell* distinguished *Fuentes* because the Florida and Pennsylvania replevin statutes reviewed in that case provided no judicial supervision of the procedure or opportunity for a hearing until final adjudication. 416 U.S. at 615-16. In reaching its result, the *Mitchell* Court carefully assessed the competing interests, focusing both on the

importance to the creditor of not applying the *Fuentes* prior hearing rule, 416 U.S. at 609-10, and on the extent to which the procedural safeguards of the Louisiana procedure minimized the possibility of an erroneous seizure. 416 U.S. at 609-10.

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 95 S.Ct. 719, 42 L.Ed.2d 751 (1975), invalidated Georgia's garnishment statute because the writ of garnishment issued without judicial supervision and without an early post-deprivation hearing for the debtor. 419 U.S. at 607. Thus, the absence of two of the safeguards deemed important in upholding the Louisiana statute in *Mitchell* was fatal to the Georgia statute.

This Court's most recent decision involving procedural due process and creditor's remedies, *Connecticut v. Doehr*, 501 U.S. ___, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), held Connecticut's prejudgment attachment lien statute unconstitutional. Concluding that the filing of a lien on real property deprived the owner of a "significant property interest", 111 S.Ct. at 2114, the Court examined the procedural safeguards to protect the property owner from an erroneous deprivation of any property rights. Although the Connecticut statute provides for an expeditious post-attachment hearing, notice for such a hearing, judicial review of an adverse decision, and a double damages remedy, the Court held that these safeguards did not adequately ameliorate the risk of erroneous deprivation.

Mitchell, North Georgia, and *Doehr*, considered together, seem to repudiate the strict prior hearing rule announced in *Fuentes*. At the same time, the three decisions make it clear that the Court will not drastically curtail the procedural protection for the owner

of an interest in real property. Reconciling the four cases, in the domain of creditors' remedies, due process requires that the owner of an interest in real property be afforded maximum protection from wrongful seizure that is consistent with protection of the creditor's interests. Any statutory provision that reduces the amount of protection provided to the debtor must be justified as necessary to provide a corresponding increase in the amount of protection received by the creditor or to advance some other significant state interest.

A mechanic's lien statute protects the lienor in an obvious way: by filing a claim of lien, the lienor ensures that the owner of an interest in real property will not defeat the creditor's entitlement to payment for labor and materials by alienating the improved property. *Mitchell* deemed it permissible to postpone the hearing to which the debtor was entitled until after his goods had been seized because of the real risk that, if notified in advance, the debtor would alienate the goods, thwarting the creditor's vendor's lien by operation of law. 416 U.S. at 609. Assuming, *arguendo*, that imposition of a prior hearing intrudes on countervailing creditor interests in the context of attachment of real property, and that the property owner does not derive a significant benefit in terms of added protection against erroneous deprivation from a prior hearing rather than an early post-perfection hearing, there remains to be considered the property owner's stake in an early post-perfection hearing. Neither the Trial Court nor the State Supreme Court found that the protections afforded the debtor by the Virginia mechanic's lien statute were as constitutionally sanctioned as those approved

in *Mitchell*. The lower courts seemed to have found that these discrepancies were not fatal to the lien statute because the lien did not effect a constitutionally cognizable deprivation of property, possibly relying on *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F.Supp. 997, 999 (D.Ariz. 1973), *aff'd* 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974).

On the contrary, however, the owner of an interest in real property has significant interests that should be protected by an immediate post-deprivation hearing. The lien filing affects his ability to alienate his property at its full value. In Virginia, this disability can continue for an extended period of time. If the lienor takes no action, the owner's property remains encumbered for the lien's statutory life of the later of six months or sixty days from completion of the project. Va. Code Section 43-17. If the lienor merely files suit to enforce the lien and takes no further action, the lien encumbers the property indefinitely; in this case, the hearing on the merits of the mechanic's lien claims was more than two years after the liens were filed. The owner can, if he wishes to shorten this period, institute show-cause proceedings after serving notice upon the lienor. Va. Code Section 43-17.1. The show-cause procedure offers little immediate relief to the debtor. Section 43-17.1 petitions receive no special priority on the docket and are subject to all the procedural delays endemic to our crowded courts. The owner of an interest in real property having a valid defense to a lien wants an early hearing on the merits; under Virginia's procedure, there is no assurance he will get it. Valid or not, the lien will remain as a property deprivation for a significant period of time.

Despite the failure of the Virginia statute to require an immediate post-petition hearing, the Trial Court's opinion went no further than finding that the Virginia mechanic's lien statute sufficiently satisfied due process. Petitioner maintains that only an immediate post-deprivation hearing provides adequate protection for the property owner against erroneous claims.

Mitchell found judicial supervision of the issuance of the writ significant in providing adequate procedural safeguards to the debtor. 416 U.S. at 605-06. Judicial supervision requires the creditor to make a clear showing before a judge of the nature and amount of the claim and the grounds upon which it is based. *Id.* Judicial supervision is, in the Court's view, an acceptable method of reducing the chances that the issuance of the writ would result in an erroneous property deprivation. 416 U.S. at 616-17. Pre-filing judicial review would also serve to discourage the filing of frivolous liens, especially in states, like Virginia, where lienors are immune from actions for damages for filing invalid liens. *See Donohoe Construction Co., Inc. v. Mount Vernon Assoc.*, 235 Va. 531, 369 S.E.2d 857 (1988).

The statutory procedure considered in *Mitchell* required the creditor to post a bond before initiating the process of depriving the debtor of his property interest. 416 U.S. at 608. The *Mitchell* Court viewed the bond as ensuring that the debtor could recover damages in the event of an erroneous seizure. 416 U.S. at 606. A bond also tests the strength of the creditor's belief in his own claim. *See Fuentes v. Shevin*, 407 U.S. at 83. Because the Virginia mechanic's lien statute fails to provide a prompt post-deprivation hearing, the owner of an interest in real

property's interest in judicial supervision and the posting of a bond against erroneous claims is even more heightened.

Mechanic's liens exist in every state. Because the liens are imposed *ex parte* by the creditor and significantly affect the rights of the property owner, they raise serious problems of procedural due process under the Supreme Court's due process decisions. Even if the due process clause does not require notice and a hearing prior to every deprivation, it does require a prompt post-deprivation hearing at which the attaching creditor bears the burden of proof. In failing to provide for an immediate post-perfection hearing, the mechanic's lien laws leave owners of interests in real property at the mercy of the lienors without providing any additional protection for the interests of the lienor. Accordingly, this procedural deficiency makes lien laws, such as Virginia's, unconstitutional.

C. Doehr has left the lower courts in conflict as to what procedural safeguards satisfy due process when the attaching creditor has a pre-existing interest in the property.

The Trial Court's holding that the filing of a mechanic's lien does not effect a deprivation of a constitutionally cognizable interest in property directly conflicts with *Shaumyan v. O'Neill*, 987 F.2d 122 (2d Cir. 1993), holding that an attachment lien filed by a creditor who furnished labor and materials for the attached real property constitutes a taking for purposes of due process analysis. *See also Reardon v. U.S.*, 947 F.2d 1508 (1st Cir. 1991) (holding lien procedure created by the Comprehensive Environmental Response, Compensation, and Liability Act to be an unconstitutional taking for purposes of the Fifth

Amendment). The lower courts' confusion following *Connecticut v. Doehr* is the result of the unanswered question as to what procedural safeguards are necessary in cases where a creditor has a pre-existing interest in the property being attached reserved by the majority in footnote 4. 111 S.Ct. at 2113. Conflict between the holdings of the *Shaumyan* and *Reardon* courts that lien statutes were or were not unconstitutional also may have been engendered by differing interpretations of the concurring opinion of Chief Justice Rehnquist in *Doehr*, in which he stated that a pre-attachment hearing and a bond would largely defeat the purposes of mechanic's lien statutes. 111 S.Ct. at 2122 (Rehnquist, C.J., concurring). In this case, Respondents relied on *Doehr's* footnote 4 and Chief Justice Rehnquist's concurrence in contending at trial and on appeal that the *Doehr* holding did not apply in the context of dual interests in property.

It is clear that the Trial Court and the State Supreme Court in this case were in need of controlling guidance from this Court as to whether the question reserved in footnote 4 in *Doehr* related to whether a lien filed by one claiming a pre-existing interest in the attached property was a constitutionally cognizable deprivation of property, or related to the adequacy of the procedural safeguards necessary to satisfy due process in such a case. The only way for the Trial Court to hold that the filing of a mechanic's lien was not a constitutionally cognizable deprivation, in light of *Doehr*, was to construe footnote 4 and Chief Justice Rehnquist's concurrence as holding that the reduction in property value effected by the filing of a lien is offset by the value that the

lienor's labor and materials have added to the owner's property.[4]

One commentator, however, aptly responded to this argument as follows:

> The reasoning that the increased property value due to the lien claimant's services offsets the owner's deprivation is tenuous. First, that analysis assumes an equality between the increased property value and the decrease in the owner's equity due to the perfected lien. That assumption is in no way axiomatic, particularly in states where lien claims can exceed the market value of the improved property. Second, the theory assumes that eventually statutory procedural prerequisites such as timeliness of filing and foreclosure actions have or will be met. Finally, that analysis assumes the underlying validity of the lien: the very issue precipitating the dispute. Comment, "Constitutionality of Mechanic's Lien Statutes," 34 Wash. & Lee L.Rev 1067, 1077 n. 56 (1977).

Fuentes held that "[a]ny significant taking of property by the State is within the purview of the Due Process Clause;" 407 U.S. at 86. The partial impair-

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[4] *See, e.g.*, Rendleman, "Analyzing the Debtor's Due Process Interest," 17 Wm. & Mary L.Rev. 35, 37-38 n. 21 (1975): "Other lien interests in real estate, like mechanics' and artisan's liens, allow the owner to continue to possess, but deter sales and mortgages. The artisan presumably added labor and materials roughly equivalent in value to the amount of the lien. If the lien attaches to the value added by the artisan's work and material, interference with the owner's interest may be *de minimis*."

ment of property rights occasioned by the filing of a lien is therefore constitutionally cognizable even if the lien attaches to the value added to the property by the claimant. This Court can take this opportunity to clarify the law in this area, and make clear that *Doehr* did *not* hold that an attachment lien is not a taking when the creditor has a pre-existing interest in the property, but that *Doehr* instead *reserved* the question of what impact the creditor's interest in the attached property has on the issue of the adequacy of the procedural safeguards provided by the statute in question to protect against erroneous deprivations.

In addition, the majority of the *Doehr* Court did not feel it necessary to reach the issue of a bonding requirement because the statute was invalidated on narrower grounds. 111 S.Ct. at 2118. The lower courts therefore do not know if such a bond is constitutionally required. In this case, the Court can resolve the following issues, left undecided in *Doehr*: (1) Does a lien filed against property in which the attaching creditor has a pre-existing interest constitute a deprivation of a constitutionally cognizable deprivation of property? and (2) Can any post-attachment remedy which does not provide a remedy to cure the effects of a wrongful, albeit temporary, taking, whether by way of a bond or a damages remedy, be constitutional? The current importance of these compelling questions is reflected in *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), holding that the temporary taking suffered by the owner before amendment of a statute depriving him of all economically viable use of his property was compensable under the Fourteenth Amendment.

In *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976), the Court of Appeals of Maryland discussed the effect of *Sniadach* and its progeny in passing on the constitutionality of the Maryland mechanic's lien statute. The court found the statute to be unconstitutional.[5] The Maryland court reconciles *Sniadach*, *Fuentes*, *Mitchell* and *North Georgia* as follows:

> What we glean from *Sniadach*, *Fuentes*, *Mitchell* and *North Georgia Finishing* is that, lacking extraordinary circumstances, statutory prejudgment creditor remedies which even temporarily deprive a debtor of a significant property interest without notice and an opportunity for a prior probable-cause-type hearing are, as held in *Fuentes*, unconstitutional under the Fourteenth Amendment's due process clause unless safeguards such as those mentioned in *Mitchell* and *North Georgia Finishing* are present and even then, although this is less clear, the law may be invalid if the issues underlying the seizure are not susceptible to uncomplicated documentary proof or if the creditor does not have a present interest in the property seized. 353 A.2d at 231.

Concluding, the court voiced its lack of confidence about the state of the law in those cases where the

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[5] *See also Roundhouse Constr. Corp. v. Telesco Masons Supplies Co.*, 168 Conn. 371, 362 A.2d 778 (1976), *vac'd and remanded*, 423 U.S. 809, *aff'd* 170 Conn. 165, 365 A.2d 393 (1976) in which the Supreme Court of Connecticut found Connecticut's mechanic's lien law to be unconstitutional.

seizure of property was not supported by simple documentary proof or the existence of an interest of the attaching creditor in the property. That is quite understandable in view of the fact that Justice White in *North Georgia* had mentioned only three of the elements so clearly set out in the *Mitchell* decision and did not discuss the element dealing with the facility of documentary proof attending issuance of the writ. 419 U.S. at 607. That omission made it difficult to tell whether *North Georgia* meant to remove the question of documentary proof as an essential element in a decision about the requirement of prior notice and a hearing. The court in *Barry Properties* was naturally perplexed by its inability to articulate with any certainty the message flowing from the sequence of *Sniadach*, *Fuentes*, *Mitchell*, and *North Georgia*. 353 A.2d at 231.[6] Justice White did discuss the element dealing with the facility of documentary proof in *Connecticut v. Doehr*, but the Court in *Doehr* did not use its latest opportunity to make a clear delineation of the essential elements for due process in cases, like this one, where not all of the *Mitchell* ameliorative factors are present. It is clear that the Trial Court, the *Shaumyan* court and the Supreme Court of Virginia are founding their decisions on unsettled law.

This Court again has the opportunity to articulate step-by-step due process analysis in cases, like this one, involving dual interests of the parties in the attached property. Justice Blackmun justifiably re-

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[6] For a discussion of the lower courts' perplexity in reconciling *Fuentes*, *Mitchell*, and *North Georgia*, *see* Griffith, "The Debtor, the Creditor, and the Fourteenth Amendment," 28 Mercer L. Rev. 663 (1977).

gretted the Court's abandonment of intelligible due process analysis in favor of a "sparse comparisons" approach, stating that this case-by-case approach provides no satisfactory answers to issues of constitutional magnitude. *North Georgia, supra*, 419 U.S. at 614-15, 620 (Blackmun, J., dissenting). This Court may take this opportunity to reconcile its due process decisions and develop the systematic due process analysis necessary for a rational jurisprudence.

CONCLUSION

The Trial Court did not undertake to balance the competing interests of the lien claimants and the owner in the real property in question, as required by *Mitchell*, but accepted the conclusion of *Spielman-Fond* that the deprivation of the owner's interests was *de minimis*. The lower courts in this case made no attempt to define what substantial creditor interest was protected by permitting filing of a lien with no requirement of an early hearing or a bond or damages remedy to protect the owner against the erroneous deprivation of his interest in property. Mechanic's liens are a violation of the due process analysis established, though not articulated, by the Supreme Court in its decisions culminating in *Doehr*. Putting aside the issue of the pre-existing interest of the creditor in the attached property, the cases suggest that there must be an early post-deprivation hearing, in which the creditor must carry the burden of proof. There is also a requirement of judicial supervision of the issuance of the writ. The additional requirement that the creditor post a bond or that the statute provide the debtor with a damages remedy reduces the risk of erroneous deprivation by testing the creditor's

belief in the validity of his claim and assures the owner of redress in appropriate circumstances.

In granting certiorari in this case, the Court will have the opportunity to articulate due process analysis in cases where the creditor claims a pre-existing interest in the attached property but the statute in question does not contain all of the *Mitchell* ameliorative factors. If the Court analyzes the ameliorative factors in the challenged procedure to determine if it strikes a sufficient protective balance to accommodate the interests of both debtor and creditor, it will find that most state mechanic's lien statutes, including the Virginia mechanic's lien statute, do not sufficiently protect owners from erroneous deprivations of property. The Court should therefore issue a writ of certiorari to review the federal constitutional challenge to the Supreme Court of Virginia's holding that the Virginia mechanic's lien statute satisfies the requirement of due process.

Respectfully submitted,

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May 7, 1993

APPENDIX

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ORDER OF THE SUPREME COURT OF VIRGINIA ON MONDAY, THE 22ND DAY OF FEBRUARY 1993 HOLDING THAT THERE IS NO REVERSIBLE ERROR IN THE JUDGMENT COMPLAINED OF:

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

DECREE OF THE CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA DENYING PETITION TO INVALIDATE MECHANIC'S LIENS:

This cause came on to be heard on the 13th day of August, 1992, on the Petition to Invalidate Mechanic's Liens of the Petitioner, Federal Deposit Insurance Corporation, as Receiver of New Bank of New England, N.A. ("FDIC"), the Memorandum in support of said Petition of the Petitioner, the Memoranda in Opposition thereto of the Respondents, Corman Construction, Inc., and Dewberry & Davis/The Joseph Boggs Studio, and argument of Counsel.

And it appearing to the Court, for the reasons more particularly stated from the Bench at the hearing on said Petition on August 13, 1992, and as set forth in the transcript of said hearing filed herein, which oral ruling is hereby incorporated herein by reference as if set forth *in haec verba*, that the interest effected by a mechanic's lien is not a property interest cognizable under the Constitutions of the United States and Virginia and that, even if such interest were cognizable, the procedural protections afforded property owners and secured lenders by Virginia's lien statute are sufficient to satisfy the requirements of due process, to which ruling the Petitioner hereby notes its exception.

And it further appearing to the Court that the Petition of the Petitioner should therefore be denied, to which ruling the Petitioner hereby notes its exception.

UPON CONSIDERATION WHEREOF, it is ADJUDGED, ORDERED, and DECREED that the Petition to Invalidate Mechanic's Liens herein be, and hereby is, DENIED.

ENTERED this 28th day of August, 1992.

/s/ Benjamin Kendrick
Judge

TRANSCRIPT OF ORAL RULING OF CIRCUIT COURT OR ARLINGTON COUNTY ON AUGUST 13, 1992

THE COURT: Thanks, counsel. In addition to the memoranda that was submitted, the Court is appreciative of the argument that you've given this morning.

And based on all of that, the court is of the opinion that there is no significant property interest that is affected by the application of the Virginia statutory mechanic's lien scheme and, therefore, it's constitutional on its face.

The Court is also of the opinion that any doubt about that is cured by the statute's meeting requirements of procedural due process under the Fourteenth Amendment.

And therefore, the record should reflect that the Court finds that the statutory schemes provided under Virginia's mechanic's lien statute are constitutional on their face and in their application.

Counsel should prepare an order reflecting the Court's findings, making note that there should be ample provision for the defendants to note their exceptions to the Court's findings and its' rulings for a complete record for the purposes of appeal.

ORDER OF THE SUPREME COURT OF VIRGINIA ON TUESDAY, THE 30TH DAY OF MARCH, 1993 DEFERRING ISSUANCE OF MANDATE:

Upon consideration of the motion of the appellant, by counsel, it is ordered that issuance of the mandate entered herein February 22, 1993 be, and the same hereby is, deferred to, and including, the 24th day of May, 1993, on the expiration of which time the same may be issued, unless the case has been before that time docketed in the Supreme Court of the United States, in which event, issuance of the mandate shall be deferred until the final determination of the case by that Court.

PETITION TO THE CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA TO DETERMINE INVALIDITY OF MECHANIC'S LIENS FILED IN JUNE OF 1992:

COMES NOW the Defendant, FDIC as Receiver of New Bank of New England, N.A., and files this its Petition to Determine the Invalidity of Mechanic's Liens, pursuant to Section 43-17.1 of the 1950 Code of Virginia, as amended, and in support thereof, states as follows:

1. That by Deed of Trust and Security Agreement dated February 10, 1989 and recorded February 13, 1989 in Deed Book 2370 at page 232, in the Clerk's Office of the Circuit Court of Arlington County, Virginia, and modified by First Amendment thereto dated February 13, 1989 and recorded in Deed Book 2372 at page 791 of the aforesaid land records, and modified by a Second Amendment thereto dated June 30, 1989 and recorded in Deed Book 2391 at page 857 of the aforesaid land records, the Defendant, Dolben Ballston Station Limited Partnership, conveyed the property forming the subject matter of this cause to Lois J. Vermillion and Frank W. Stearns, Trustees, in trust to secure the Defendant, Bank of New England, N.A., payment of a promissory note in the original principal sum of $12,000,000.00.

2. That Sigal Construction Corporation seeks to enforce two Memoranda of Mechanic's Lien, pursuant to the provisions set forth in Title 43, Chapters 1 and 9 of the 1950 Code of Virginia, as amended, against the subject property, which liens were recorded in Deed Book 2438 at Page 29 on June 29, 1990, and Deed Book 2438 at Page 27 on June 29, 1990, among the land records of Arlington County, Virginia.

3. That Dewberry & Davis/The Joseph Boggs Studio seeks to enforce two Memoranda of Mechanic's Lien, pursuant to the provisions set forth in Title 43, Chapters 1 and 9 of the 1950 Code of Virginia, as amended, against the subject property, which liens were recorded in Deed

Book 2433 at Page 1772 on May 30, 1990, and Deed Book 2439 at Page 1907 on July 12, 1990, among the land records of Arlington County, Virginia.

4. That Corman Construction, Inc. seeks to enforce a Memorandum of Mechanic's Lien, pursuant to the provisions set forth in Title 43, Chapters 1 and 9 of the 1950 Code of Virginia, as amended, against the subject property, which lien was recorded in Deed Book 2425 at Page 805 on March 28, 1990, among the land records of Arlington County, Virginia.

5. That prior to January 6, 1991, the Defendant, Bank of New England, N.A., was a national banking association organized and existing under the laws of the United States of America.

6. That on January 6, 1991, the Comptroller of the Currency of the United States of America closed Bank of New England, N.A., pursuant to the provisions of the National Bank Act and, pursuant thereto, and pursuant to the Federal Deposit Insurance Act, took possession of the property and business of said bank, and appointed the Federal Deposit Insurance Corporation (the "FDIC" as Receiver), as Receiver thereof.

7. That the Comptroller of the Currency thereupon chartered a new national banking association, New Bank of New England, N.A. (the "Bridge Bank").

8. That as a result of that transaction, the Bridge Bank assumed certain assets from the Federal Deposit Insurance Corporation as Receiver of Bank of New England, N.A.

9. That on July 13, 1991, the Bridge Bank was dissolved pursuant to 12 U.S.C.A. Section 1821(n)(12) and the FDIC was appointed as Receiver thereof and charged with winding up its affairs.

10. That the Fourteenth Amendment to the Constitution of the Untied States of America prohibits any state from

depriving any person of property without due process of law.

11. That the filing and perfection of a mechanic's or materialman's lien pursuant to Chapters 1 and 9 of the 1950 Code of Virginia, as amended, is effected pursuant to the statutory authority of the Commonwealth of Virginia. Certain state officials play an essential role in the filing and perfection of the lien. Thus, there is sufficient state action involved in the creation of mechanic's and materialman's liens in Virginia to bring this authority within the purview of the constitutional limitations on the states imposed by the Fourteenth Amendment. Notwithstanding the scope of the Fourteenth Amendment, Article I, Section 11 of the Constitution of the Commonwealth of Virginia provides that "no person shall be deprived of his. . .property without due process of law." Thus, the statutory scheme for mechanic's and materialman's liens in Virginia is constitutionally required to meet minimum standards of due process.

12. That a mechanic's or materialman's lien operates immediately to deprive the owner of the real estate in question of the unrestricted use of his property. This right is a constitutionally protected interest in property and cannot be taken from an individual without due process of law.

13. That due process requires at a minimum that there be notice and an opportunity to be heard prior to any deprivation of a property right. The Virginia mechanic's and materialman's lien law makes limited provision for notice to the owner of the real property and makes no provision for an opportunity to be heard prior to the creation of the lien. Without provisions of this nature, the statutory scheme is constitutionally defective unless extraordinary circumstances justify a variance from traditional due process standards.

14. That Chapters 1 and 9 of Title 43 of the 1950 Code of Virginia, as amended, fail to satisfy the criteria necessary to constitute an extraordinary situation in that there is no governmental or general public interest in providing for mechanic's and materialman's liens; there is no special need for prompt action; and the procedure is not strictly controlled by the State. Contrary to the requirements imposed by the Supreme Court, the statutes do not provide for judicial control through the process; nor do they require a convincing showing of the necessity of the lien prior to perfecting the same; nor do they provide for an immediate post-seizure hearing in which the complainant is required to prove the validity of his lien.

15. That, in addition, in the instant case, the parties asserting liens herein are not parties to voluntary agreements with the undersigned's predecessors in interest herein, and the mechanic's lien statute, to the extent it deprives the undersigned of a significant property interest without due process, is therefore unconstitutional as applied to the undersigned.

16. That, therefore, the Virginia statutory scheme providing for mechanic's and materialman's liens is constitutionally defective and must be overturned and the liens of which enforcement is sought herein perfected pursuant thereto must be declared invalid, unenforceable and void.

WHEREFORE, the undersigned Defendant respectfully moves this Court, pursuant to Section 43-17.1 of the 1950 Code of Virginia, as amended, to hold a hearing and to enter a decree (1) declaring Title 43, Chapter 1 and 9 of the 1950 Code of Virginia, as amended, to be unconstitutional; and (2) declaring the Memoranda of Mechanic's Lien sought to be enforced herein to be invalid and unenforceable.

SURVEY OF STATE MECHANIC'S LIEN STATUTES

State	Bond Required/Penalty ------- Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Alabama §35-11-5	Yes ——— Research has failed to reveal whether filing of lien is judicially priviledged.	No/Not Applicable
Alaska	No/Yes. §34.35.074. Civil—§34.35.074. (1) Damages caused by violation, plus costs, and reasonable attorney's fees; (2) Injunction, costs, reasonable attorney's fees. ——— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
Arizona §33-1004 §33-420	No/No ——— Judicially Privileged. *See* §33-420	No/Not Applicable

SURVEY OF STATE MECHANIC'S LIEN STATUTES (Cont'd)

Time to File Lien	Time to File Suit
Original contractors must file verified statement of lien within six months after the last item of work has been performed. Ala. Code §35-11-215; *Laborers* must file within 30 days after last item of work has been furnished. *Id.*	Within six months of last labor performed. Ala. Code §35-11-221
Alaska Code §34.35.068; 90 days after completion of building or labor ceases; 15 days after notice of completion is recorded.	Alaska Code §34.38.080; six months after claim is recorded.
Prime contractors—notice and claim of lien must be recorded within 90 days of completion of work. Arizona Rev. Stat. Ann. §33-993(A) (1990). *Non-prime contractors*—notice and claim for lien must be recorded within 60 days after completion. §33-993(A) (1990).	Must bring action to foreclose mechanic's liens within six months of recording. Ariz. Rev. Stat. §33-998 (1990).

State	Bond Required/Penalty ------- Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Arkansas §18-43-101, *et seq.*	No/No ——— Judicially Privileged §18-41-1935	No/Not Applicable
California CC 3109, *et seq*	No/No ——— Judicially Privileged. §47, Subd. 2	No/Not Applicable
Colorado §38-22-101, *et seq*	No/Yes, if lien knowingly excessive. §38-22-128 (all costs and atty fees); ——— No—Basis for libel and slander action lies	No. §38-22-113. Only advances filed suit to head of docket; not a separate hearing on validity of lien/Not Applicable
Connecticut	No/No ——— Judicially privileged 493 A.2d 236	Yes. §49-35b; burden to show probable cause that lien valid on claimant, *if* owner applies to court under §49-35a.

Time to File Lien	Time to File Suit
Must file within 120 days of completion a "just and true account." Ark. Stat. §18-44-117(a) (Michie 1987).	Must file suit within 15 months after filing the lien. Ark. Stat. §18-44-119.
Within 60 days after notice of completion or cessation is recorded or within 90 days after completion if no notice is recorded. Cal. Civ. Code §3115.	Lien claimant must file suit to foreclose its mechanic's lien within 90 days of the date that its claim of lien is recorded. Cal. Civ. Code §3144.
Colo. Code §38-22-109; Two months for laborers; four months for others.	Colo. Code §38-22-110. Six months after work perfected or building completed.
Conn. Stat. §49-34; 90 days.	Conn. Stat. §49-34; 1 year.

State	Bond Required/Penalty --- Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Delaware	No/No ——— Research has failed to reveal statutes or case law on this issue	No/Not Applicable
Florida	No/Yes. §713.31; civil damages if fraudulent lien. §713.35; perjury conviction ——— Research has failed to reveal statutes or case law on this issue.	No. Owner may file complaint, requiring claimant to file suit or show cause within 20 days why lien should not be forfeited; or debtor can file notice of contest, which requires creditor to commence action within 60 days or lose lien. / Not Applicable. §713.21, §713.22
Georgia OCGA §44-14-360, *et seq*	No/No ——— Judicially privileged §51-5.8. 397 S.E.2d 620	No/Not Applicable

Time to File Lien	Time to File Suit
Principal contractor who has contracted *directly* with owner and has provided both labor *and* materials, must file statement of claim not less than 90, nor more than 120 days, after completion. Del. Code Ann. Tit. 25, §2711(a). All others must file statement of claim within 90 days of completion or last day materials provided. *Id.*	None
Fla. Stat. §713.08; 90 days after final funding of the labor.	Fla. Stat. §713.22; 1 year from recording of lien; 60 days after owner files notice of contest of lien.
Lienor must record claim of lien within three months after completing its work or furnishing material. Ga. Code §44-14-361.1(a).	Lienor must file suit within 12 months from when debt became due. Ga. Code §44-14-361.1(a)(3).

State	Bond Required/Penalty ------ Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Hawaii HRS §507-41, *et seq*	No/No ——— Research has filed to reveal statues or case law on this issue.	Yes. Not less than 3 nor more than 10 days after application and notice. §507-43(a)/ Burden on lienor to show that probable cause exists for lien.
Illinois Ill. Rev. Stat. Ch. 82, §28 *et seq.*	No/No ——— Judicially Privileged 466 N.E.2d 243 485 N.E.2d 321 339 N.E.2d 274	No. Owner may serve written demand on lienor to commence suit within 30 days. Ill. Rev. Stat. Ch. 82, §30 (1989)/Not Applicable
Idaho IC §45-501, *et seq.*	No/No ——— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
Indiana ISA §32-8-3-1, *et seq.*	No/No ——— Research has failed to reveal statutes or case law on this issue.	No. §32-8-3-10; owner gives 30-day notice to claimant to file suit or lose lien. §32-8-3-11 provides for expedited suit at behest of owner. (30 days)/Not Applicable.

Time to File Lien	Time to File Suit
Lienor must file application for, and notice of, lien within 45 days of completion of improvement. Haw. Rev. Stat. §507-43(b).	Following initial hearing, if court finds probable cause for lien to attach, then suit must be commenced within three months. §507-43(3), -47.
Lienor, either general or subcontractor, must record claim for lien within four calendar months of the completion of the work. 432 N.E.2d 1048 (1982); Subcontractor must serve written notice of claim on owner within 90 days of completion of work. Ill. Rev. Stat. Ch. 82, §28 (1989).	Lienor must file complaint to foreclose a mechanic's lien within two years of the completion of the work. Ill. Rev. Stat. Ch. 82, §§9, 28 (1989).
General contractor must file notice of lien within 90 days after the completion. Idaho Code §45-507 (Supp. 1991); Subcontractors must file a notice of lien within 60 days after completion. *Id.*	Lien claimant must initiate foreclosure of lien within six months of filing. Idaho Code §45-510 (1927).
Ind. Stat. Ann. §32-8-3-3; 60 days from performing work.	Ind. Stat. Ann. §32-8-3-6; 1 year from filing lien.

State	Bond Required/Penalty —— Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Iowa ICA §572.1, *et seq.*	No/No —— Judicially Privileged 315 N.W.2d 734	No, but 572.28 provides for expedited suit upon written demand of owner. (30 days)/Not Applicable
Kansas KSA §60-1101, *et seq.*	No/No —— Research has failed to reveal statutes or case law on this issue.	No, but §60-1108 provides for immediate suit by owner for adjudication of liens/ Not Applicable
Kentucky KRS §376.010, *et seq.*	No/Yes. §376.220; civil damages action for damage caused thereby, including reasonable court costs and attorney's fees. —— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable

Time to File Lien	Time to File Suit
Lien claimant must file a notarized "lien statement" within 90 days of last material furnished or last labor performed. Iowa Code §572.8 (1991).	Lien claimant must file suit within two years from the expiration of the 90-day filing period. Iowa Code §572.24.
Lien claimant under contract with owner must file lien statement within four months of date material was last furnished or labor last performed. Kan. Stat. Ann. §60-1102(a) (1983); Subcontractor must file within three months. *Id.* §60-1103(a) (Supp. 1990).	Lien claimant must file action to foreclose within one year of filing of the lien. *Id.* §60-1105(a).
Ken. Rev. Stat. §376.010; 75 days after last item of material or labor is furnished (less than $1,000); 120 days after last item of material or labor is furnished (greater than $1,000); 45 days for owner-occupied dwelling. §376.080; six months after lienor ceases to labor or furnish materials—must file statement of amount due him with county clerk;	Ken. Rev. Stat. §376.090; action must be brought within 12 months from date of filing the statement with the clerk.

State	Bond Required/Penalty --- Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Louisiana	No/Yes. Civil damages action for damages and attorney's fees. §9:4833 --- Research has failed to reveal statutes or case law on this issue.	No. But owner may "convoke a concursus" after time for filing liens has passed and by rule order claimants to show cause why claim should not be dismissed. §9:4841/Not Applicable.
Maine MRSA §10 3521, *et seq.*	No/No. 10 §3254 provides no penalty unless shown to be willful or malicious. --- Qualified Privilege 857 F.2d 4; 673 F.Supp. 622	No/Not Applicable
Maryland ACM §9-101, *et seq.*	Yes—within court's discretion. §9-106(b)(3)(v). No civil penalty—other than bond lost. --- Qualified Privilege 373 A.2d 1273	No lien attaches until claimant prevails at hearing; burden on claimant. §9-106(a).

Time to File Lien	Time to File Suit
General contractor has 60 days after completion to file a claim if a notice of contract has been filed. La. Rev. Stat. Ann. §9:4822 (West 1991 & Supp. 1992); Subcontractor has 30 days if notice filed or 60 days from completion if no notice filed. *Id.*	Any party may "convoke a concursus" after period has passed for filing claim. §9:4841.
Me. Rev. St. Ann. §10 3253; 90 days after lienor ceases to furnish labor—must file statement of amount due with office of registry of deeds.	Me. Rev. St. Ann. §10 3255; 120 days after last of labor or services are performed—must file action with clerk of the court.
Must file within 180 days after work has been finished or materials furnished. Md. Code §9-105.	Must file petition to enforce within one year after petition to establish lien was first filed. Md. Code §9-109

State	Bond Required/Penalty --- Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Massachusetts MGLA Ch. 254, §1, *et seq.*	None. MGLA Ch. 254, §11 merely provides that lien will be declared invalid if it is shown lienor has willfully and knowingly claimed more than is due. ——— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
Michigan MSA §26.316	Lien is simply dismissed. No civil or criminal penalty. MSA §26.316(111) ——— Qualified Privilege 276 N.W.2d 522 463 N.W.2d 479	No/Not Applicable
Minnesota MSA §514.01, *et seq.*	No/No ——— Qualified Privilege §514.74	No/Not Applicable
Mississippi MCA §85-7-131, *et seq.*	No/Yes. Claimant is liable for full amount claimed; §85-7-201. ——— No. §85-7-201	No/Not Applicable

Time to File Lien	Time to File Suit
MGLA Ch. 254, §11; lienor must file 30 days after date on which principle contract is to be performed, i.e. completed, a statement of amount due.	Lienor must commence action to enforce within 60 days of filing required by §8.
Lienor must record a claim within 90 days of completion or last furnishing. Mich. Stat. Ann. §26.316 (111)	Claim to enforce lien must be brought within one year after claim of lien is recorded. §26.316(111)
Lien claimant must file within 120 days of completion or last contribution. Minn. Stat. §514.08, subd. 1 (1990)	Must commence foreclosure within one year after its date of last work. §514.12, subd. 3 (1990) 176 N.W. 497 (1900).
Not provided by statute.	Must file suit within 12 months when debt became due and payable. Miss. Code Ann. §85-7-141 (1991).

State	Bond Required/Penalty ------- Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Missouri VAMS §429.010, *et seq.*	No/None. §429.080; lien is simply dismissed ——— Research has failed to reveal statutes or case law on this issue	No/Not Applicable
Montana MCA §71-3-101, *et seq.*	No/No ——— Judicially privileged 745 P.2d 359 70-19-102; 102(1)	No/Not Applicable
Nebraska RSN §52-125, *et seq.*	Civil—damages, including costs of correcting the record and reasonable attorney's fees, if lienor files claim in *bad faith*. §52-157 ——— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
Nevada NRS §108.221, *et seq.*	No/No—claim is dismissed. §108.229 ——— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable

Time to File Lien	Time to File Suit
Lienor must file an accounting within six months after the "indebtedness shall have accrued". Missouri VAMS §429.080	Lienor must commence action within six months of having filed the lien. §429.170
Lien claimant must file within 90 days. Mont. Code Ann. §71-3-531 (1991).	Action must be initiated within two years of the filing of the lien. Mont. Code Ann. §71-3-562 (1991).
Neb. RSN §52-137; must record a lien within 120 days of final furnishing of services or materials; §52-140; owner can seek action within 30 days of notice to institute.	§52-140; lienor must bring action within two years after recording of lien;
Must file within 90 days from completion of the work or last delivery of materials. Nev. Rev. Stat. §108.226 (1971).	Suit must be filed within six months of recording the lien. *Id.* §108.223, 224 (1965).

State	Bond Required/Penalty ------ Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
New Hampshire NHRSA §447:1, *et seq.*	No/No —————— Qualified Privilege 379 A.2d 798	No/Not Applicable
New Jersey NJSA §2A:44-64, *et seq.*	No/No—but slander of title action may be brought. —————— Qualified Privilege 575 A.2d 1375 §2A:44-71	No/Not Applicable
New Mexico NMSA 48-2-1, *et seq.*	No/No —————— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
New York Lien law, Art. 2, §3, *et seq.*	Civil—Lienor is liable for damages, including reasonable attorney's fees. §39a. —————— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
North Carolina GSNC §44A-7	No/No —————— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable

Time to File Lien	Time to File Suit
Lien must be perfected within 120 days of completion of work. N.H. Rev. Stat. Ann. §447:9 (1991).	N/A. *See* N.H. Rev. Stat. Ann. §447:9 (1991).
Must file within four months after the date of last labor performed or materials furnished. N.J. Stat. Ann. §2A:44-91 (West 1941).	Must file suit on lien claim within four months after last labor or materials stated in lien claim. *Id.* §2A:44-97 to 99.
Original contractors have 120 days from completion of the contract to file a claim of lien. N.M. Stat. Ann. §48-2-8 (Michie 1978); all others have 90 days after completion to file claim of lien. *Id.*	Lien claimant has two years from date of filing lien clam to commence suit. *Id.* §48-2-10. (Michie 1978) Replacement Pamphlet (1991).
§10; lienor must file within in eight months of completion or four months for single family dwelling;	New York Lien Law §17; lien will continue for one year after notice of lien has been filed.
Lien claims must be filed within 120 days after the last furnishing of labor or materials. N.C. Gen. Stat. §44A-11 (1989).	Action to enforce lien must be instituted within 180 days after the last furnishing of labor or materials. *Id.* §44A-13(a) (1989).

State	Bond Required/Penalty ----- Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
North Dakota NDCCA §35-27-01, *et seq.*	Criminal—A Class A misdemeanor; §35-27-26 ——— No. §See 35-27-26	No. But suit must be commenced within 30 days after request of owner. §35-27-25
Ohio ORCA §1311.2, *et seq.*	No/No. §1311.16; attorney's fees to lienholders ——— Research has failed to reveal statutes or case law on this issue.	No. §1311.311; owner can file notice to commence suit on lienholder, who then has 60 days to enforce or forfeit/lien Not Applicable
Oklahoma OSA 42 §141, *et seq.*	42 §142.4; is a felony to file a fraudulent statement; no civil penalty. ——— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
Oregon ORSA §87.001, *et seq.*	No/No ——— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable

Time to File Lien	Time to File Suit
NDCCA §35-27-13; lienor must record with registry of deeds within 90 days of completion; §35-27-25; owner can file written demand for suit to commence within 30 days.	Lienor must file suit within 3 years of recording claim for lien. §35-27-25
ORCA §1311.26; four months from perfection of labor.	None provided in statute
OSA 42, §142; lienor must file statement with office of county clerk within four months of completion;	Claimant must commence action to enforce the lien within one year from the filing of lien statement. 42, §172
Must be filed within 75 days of completion or last furnishing. Or. Rev. Stat. §87.035 (1991).	Suit to foreclose lien must be filed within 120 days after recording claim of lien. *Id.* §87.055 (1991).

State	Bond Required/Penalty ----- Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Pennsylvania Purdon's PSA 49 Sec. 1, *et seq.*	No/No ----- Judicially Privileged 502 A.2d 686 415 A.2d 698	Yes. 49 PS, §1505. Burden on owner to show claimant failed to comply with Mechanic's Lien Act.
Rhode Island GLRI §34-28-1, *et seq.*	No/No ----- Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
South Carolina CLSC §29-5-10, *et seq.*	No/No. Other than dismissal; §29-5-100 ----- Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
South Dakota §44-9-1, *et seq.*	No/No. Other than dismissal; §44-9-16 ----- Qualified Privilege 169 NW 512	No. Make written demand on claimant to file suit to enforce; if he doesn't within 30 days, he forfeits the lien; §44-9-26/Not Applicable
Tennessee	No/No. Other than dismissal; §66-11-139. ----- Research has failed to reveal statutes or case law on this issue.	No. On written demand, claimant must file suit within 60 days, or forfeit; §66-11-130/ Not Applicable

Time to File Lien	Time to File Suit
49PS §1502; four months	None provided in statute
Notice of intention must be filed within 120 days of furnishing materials or labor. R.I. Gen. Laws §§34-28-4, -9.	Suit must be instituted within 120 days after filing notice of intention. §34-28-10.
Must record certificate of lien within 90 days after ceased furnishing labor. S.C. Code Ann. §29-5-90 (Law Co-op 1976).	Must bring suit to foreclose lien within six months after claimant ceases to furnish labor. *Id.* §29-5-120.
Claimant must file claim within 120 days of completion of work. §44-9-15.	File suit within six years; South Dakota Code §44-9-25.
Tenn. Code §66-11-115; 90 days of work.	§66-11-115; 90 days of lien.

State	Bond Required/Penalty --- Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Texas TCA §53.001, *et seq.*	No/No ——— Judicially Privileged 202 F.Supp. 27 543 S.W.2d 715 621 S.W.2d 205 632 S.W.2d 145	No/Not Applicable
Utah UCA §38-1-10, *et seq.*	No/Yes. Misdemeanor; civil penalty; §38-1-25. ——— Judicially Privileged 751 P.2d 1131	No/Not Applicable
Vermont VSA §T.9 Sec. 1921, *et seq.*	No/No ——— Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
Washington RCWA §60.04.010, *et seq.*	No/Yes. §60.04.221; if claim is frivolous and without legal cause, then owner gets costs and reasonable attorney's fees. ——— Judicially Privileged 826 P.2d 1089 RCWA §4.28.320 RCWA §60.04.060--658 P2d 679	No/Not Applicable

Time to File Lien	Time to File Suit
Lien claimant must file affidavit of lien by the 15th day of the fourth calendar month after the day on which the indebtedness occurs. Tex. Prop. Code §53.052 (West 1992).	The later of two years after date of affidavit of lien is filed or one year after completion of work under the original agreement. *Id.* §53.158.
Utah Code Ann. §38-1-17; original contractor has 100 days after completion; all others have 80 days;	§38-1-11; lienor must bring an action to enforce within 12 months of completion of work.
Must file notice of lien within 120 days from time payment became due for last of materials or labor supplied. Vt. Stat. Ann. Tit. 9, §1921(c) (1984 Supp. 1991).	Suit must be commended within three months of filing of notice. *Id.* §1924 (1984).
Lienor must record claim of lien within 90 days of cessation of work. -S. 5497, 52d Leg, Reg. Sess. §10 (1991)	Lienor must file action to foreclose the lien within eight months of recording claim. S. 5497, 52d Leg, Reg. Sess., §14 (1991).

State	Bond Required/Penalty ----- Judicially Privileged	Post-Filing Hearing Required/Burden of Proof at Hearing
Washington, D.C.	No/No _____ Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
West Virginia WVC §38-2-1, *et seq.*	No/No. Other than claim dismissed. §38-2-14. _____ Research has failed to reveal statutes or case law on this issue.	No/Not Applicable
Wisconsin WSA §779.01, *et seq.*	No/No _____ Judicially Privileged 445 N.W2d 699 WSA 706.13	No/Not Applicable
Wyoming WSA §29-2-101, *et seq.*	No/No. Other than claim dismissed. §29-2-110. _____ Qualified Privilege 713 P2d 776	No/Not Applicable

Time to File Lien	Time to File Suit
Lien claimant must file within 3 months after the completion of such building. D.C. Code §38-102.	Suit must be commenced within one year of filing of notice. §38-115.
Must record notice of lien within 90 days of completion of contract. W.Va. Code §38-2-1 (1931).	Suit must be instituted within six months of the recording of notice of lien. *Id.* §38-2-34.
Must file claim for lien within six months from date last furnished labor or materials. Wis. Stat. §779.02(2)(b) (1989).	Foreclosure must be instituted within two years that claim for lien was filed. *Id.* §779.06(1).
General contractor must file lien statement within 120 days of last day work was performed or materials provided. Wyo. State. §29-2-106 (Supp. 1991).	Suit to enforce lien must be brought within 180 days after filing of lien statement. *Id.* §§29-2-109, 29-3-109.

No. 92-1771

In the Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF NEW BANK OF NEW ENGLAND, N.A., PETITIONER

v.

CORMAN CONSTRUCTION, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The Acting Solicitor General, on behalf of the United States, requests the Court to dismiss the petition in this case, because it was not authorized by the Solicitor General.[1]

Under 28 U.S.C. 518(a), "the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." By regulation, the Attorney General has delegated to the Solicitor General the responsibility for "[c]onducting, or assigning and

[1] The Federal Deposit Insurance Corporation agrees with the views expressed in this memorandum.

supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and * * * settlement thereof." 28 C.F.R. 0.20(a). See generally *United States* v. *Providence Journal Co.*, 485 U.S. 693, 698-700 (1988).

Because the Federal Deposit Insurance Corporation is the petitioner, this case is one "in which the United States is interested" for purposes of 28 U.S.C. 518(a).[2] The Solicitor General did not authorize filing of the petition in this case. Accordingly, the Court lacks jurisdiction over the petition and, in accordance with the Court's past practice, the petition should be dismissed. See *Providence Journal Co.*, 485 U.S. at 708.

It is therefore respectfully submitted that the petition for a writ of certiorari should be dismissed for want of jurisdiction.

WILLIAM C. BRYSON
Acting Solicitor General

ALFRED J.T. BYRNE
General Counsel
Federal Deposit Insurance Corporation

MAY 1993

[2] The management of the FDIC is vested in a Board of Directors consisting of five members, one of whom is the Comptroller of the Currency, one of whom is the Director of the Office of Thrift Supervision, and three of whom are appointed by the President, by and with the advice and consent of the Senate. 12 U.S.C. 1812 (Supp. III 1991). The Comptroller of the Currency also is appointed by the President, by and with the advice and consent of the Senate. 12 U.S.C. 2. Finally, the Director of the Office of Thrift Supervision is "subject to the general oversight of the Secretary of the Treasury," 12 U.S.C. 1462a(b)(1) (Supp. III 1991), and appointed by the President, by and with the advice and consent of the Senate, 12 U.S.C. 1462a(c)(1) (Supp. III 1991).